No. . . . . .

In The

United States Circuit Court of Appeals

For The Ninth Circuit.

MATT MEEHAN AND
THOMAS LARSON,
Appellants,

vs.

O. A. NELSON,
G. M. HENSLEY AND
MICHAEL McMAHON,
Respondents.

APPELLANTS' BRIEF.

JOHN GARBER and
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Filed this day of February, A. D. 1905.

MIESTER, 529 California Street.

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Statement of the Case.

This suit was brought by Nelson and Hensley, two of the respondents, against Meehan and Larson, the appellants, and McMahon, one of the respondents, for the specific performance of an alleged contract by which Meehan and Larson agreed to give the plaintiffs a one-half interest in a certain Alaska mining claim if the plaintiffs should sink thereon three holes to bed-rock. Plaintiffs had judgment in their favor requiring all the defendants to convey to them this interest and for one-half of the royalties and rents collected by all the defendants from the property.

Defendants Meehan and Larson have appealed.

The District Court found that all three of the defendants owned the mining claim, that two of them, Meehan and Larson, entered into the agreement with the plaintiffs above alluded to, that the plaintiffs put the three holes to bedrock; and that all the defendants have received royalties and rents amounting to $3000. (Transcript, pp. 159-161.)

On these facts the Court found as conclusions of law that the plaintiffs were entitled to a decree for a conveyance of one-half of the claim, and to a judgment for one-half of the rents and royalties collected by Meehan and Larson. (Tr., pp. 161, 162.)

Specifications of Error Relied Upon.

The errors relied upon are:

1st. That the Court erred in finding that the plaintiffs performed all the conditions of their agreement. (First Assignment of Errors, Tr., p. 166.)

2nd. That the Court erred in finding that the defendants, after the completion of the sinking of the three holes by plaintiffs, without inspecting the work, promised plaintiffs to make a conveyance, but neglected to examine and inspect the work until it was impossible to do so by reason of said holes having caved in and filled with water. (Third Assignment of Errors, Tr., p. 167.)

3rd. That the Court erred in its conclusion of law,

that the plaintiffs performed all the conditions of their agreement. (Fifth Assignment of Errors, Tr., p. 168.)

4th. That the Court erred in its conclusion of law, that defendants are estopped from questioning plaintiffs' rights to said premises under said agreement by reason of the facts stated in the fifth paragraph of the Findings of Fact herein. (Seventh Assignment of Errors, Tr., p. 168.)

5th. That the Court erred in its conclusion of law that the plaintiffs are entitled to a judgment for one-half of the rents and royalties collected by the defendants, Meehan and Larson. (Eighth Assignment of Errors, Tr., p. 169.)

BRIEF OF THE ARGUMENT.

I.

The finding that plaintiffs performed the work is wholly unsustained by the evidence.

There can be no question that this Court may compare a finding with the evidence, to see if there be any testimony at all to support it, and that, in the absence of all evidence whatever on which the finding can be based, the court must hold, as a matter of law, not of fact, that the finding is improper, and, on that ground will reverse a judgment dependent on such finding.

Davis vs. Schwartz, 155 U. S. 636.
Dooley vs. Pease, 180 U. S. 132.
Hathaway vs. Bank, 134 U. S. 498.

Runkle vs. Burnham, 138 U. S. 226.
Macintosh vs. Price, 121 Fed. 716.
Eureka County Bank vs. Clarke, 130 Fed. 327.
Last Chance Mg. Co. vs. Bunker Hill Co., 131 Fed. 587.

The complaint, necessarily and affirmatively, averred a fulfilment by the plaintiffs of all of the conditions of the contract to be by them performed. The answer denied this averment, and there was thus raised an issue, the affirmative burden of which was cast on the plaintiffs, as to a point of fact absolutely vital to their success in the suit, and as to which the proof should have been clear, positive and complete, with nothing left to inference or guesswork.

The contract sued on required the plaintiffs to dig three holes through the gravel of a mining claim down to the bedrock underlying it. An examination of the record will disclose that Meehan and Larson's denial of the allegation above referred to, their refusal to make a conveyance to the plaintiffs, and their resistance of this suit, are based upon their contention that these three holes were not dug to bedrock as they should have been. For the purpose of determining whether the work had or had not been done in accordance with the contract, these defendants dug three other holes, one adjoining each of the holes dug by the plaintiffs, and after getting down to bedrock drifted along the bedrock and in the direction of the holes dug by the plaintiffs, and seemed to have convinced themselves by this

investigation that one or two of the plaintiffs' holes had never reached the bedrock.

By way of anticipating these defendants' position in this regard, a number of witnesses were called by the plaintiffs, who testified that they had examined the holes dug by the plaintiff and those dug by Meehan and Larson, and that in their opinion the drifts running from the holes dug by Meehan and Larson were not run in the direction of the holes made by the plaintiffs, and the court will find in reading the testimony that it bears almost exclusively on this point. But it must be clear that even the most overwhelming evidence to the effect that Meehan and Larson's exploration of the ground was imperfect and incorrect could not dispense with the necessity on the plaintiffs' part of proving affirmatively that they did do the work, and that in this they wholly failed.

The evidence began (Tr., p. 19) with the testimony of Nelson, one of the plaintiffs, who, being asked what he did in the way of carrying out the agreement, answered: "I fulfilled the contract." Evidently recognizing that this answer was a mere legal conclusion and not proof of a fact, his counsel then said: "State what you did." The witness then said that he and Hensley, the other plaintiff, started a hole on the 6th of February, 1903, and then proceeded as follows: "We had Meehan's dogs and moved our stuff out with them; I went back with them and I came back to six and then the work was started; there was a fire put going

in the first hole and the next morning we cleaned that fire out and started to dig for the second hole, we got that through the muck and had a fire in the two holes and then started on the third hole and kept working away until we got to bedrock in the second hole, that is the hole on the lower end of four, and almost to bedrock on the other hole, that would be on the upper end of three; we was down but I don't remember how many feet; we was down in the third hole and we ran out of grub and built a fire in the second hole; after we got the grub we cribbed and finished two, I was taking some prospects in the third hole but the water filled it and we couldn't do the work and so when we had fulfilled the contract we took and pulled the grub back out of there."

It appears from this statement that after the plaintiffs had done a certain amount of work they got out of provisions, that they came away, replenished their store of food, went back, cribbed and finished two of the holes, and were taking some prospects in the third hole when the water filled it and prevented any further work, and that they then quit the place altogether.

It must be confessed that the witness' language was not clear and does not make easy reading; but both he and his counsel knew that he was testifying as to the point of fact which was essential for him to prove, and if his evidence was left in an unsatisfactory condition the responsibility is with them. Certainly the want of clearness in the statement is not helped out by the fol-

lowing question and answer on page 21: "Q. After you had returned with your grub and finished your work then what did you do? A. After the work was done I went over on Captain Creek one trip, that was on the 6th of March." Both question and answer fail to bring out what work it was the plaintiffs did and finished. Nor is any further light thrown upon the matter by the question and answer at the top of page 24. "Q. Will you state the depth to bedrock? A. The first hole was a strong 16 feet deep and one foot down in the bedrock. The second hole is 17 and some inches to bedrock, I think 3 inches or something like that—anyway it is a strong 17 feet and the other one is 22 feet or about that."

This answer asserts nothing more positively than that the first hole went down a foot into the bedrock, that the second hole went to bedrock, and that the third hole was 22 feet deep. Whether the third hole did or did not reach bedrock was a point which the witness studiously and successfully evaded.

The plaintiff Hensley did not testify, and the evidence above referred to, appearing on pages 19, 20, 21 and 24 of the Transcript, is absolutely all that there is in the record in the way of direct testimony bearing upon the completion of the contract by the plaintiffs.

It is confidently submitted that this testimony was wholly insufficient as proving or even tending to prove such completion, and that the finding of the court to the

effect that the work was completed rests upon no evidence whatever.

Counsel for the plaintiffs seem to have realized this, for they got the trial court to find as a fact (Tr., p. 160), that the defendants, after the completion of the work, promised to make a conveyance but delayed, neglected and failed to make the same and to examine and inspect the work until it was impossible to do so by reason of the holes having caved in and filled with water, and as a matter of law (bottom of p. 161 of the transcript), that the defendants are estopped from questioning plaintiffs' rights to said premises by reason of the facts so found.

As to this, we can only say that we know of no principle of law which from such facts would create an estoppel on the defendants in favor of the plaintiffs to the extent of relieving the plaintiffs from at least the necessity of affirmatively proving that they had complied with their contract.

Not only was there a failure on the part of the plaintiffs to affirmatively prove their completion of the work, but an examination of the record will show that it was positively and affirmatively proved, without any contradiction in the evidence, that they did not complete the work, that is to say: the evidence showed without contradiction that the drift run from the hole dug by Meehan and Larson contiguous to the plaintiffs' hole number three terminated in solid gravel, which had not

been moved or disturbed at all. (Tr. pp. 107, 108, 112, 113, 120, 121, 127, 128, 135.) These references are to the testimony of Boss, Ziemer, Davis, Crowley and Meehan, each and all of whom swore positively that the drift from defendants' hole number three ran wholly through and to undisturbed gravel. Nowhere in the evidence is to be found even an attempt to contradict these positive statements.

The only question of fact remaining was whether this drift was so run as to reach the plaintiffs' hole number three or the place where the plaintiffs' hole number three would have been found if it had been sunk to bedrock. As to this point, there was considerable evidence given on both sides which it will be probably urged by the other side was of such a conflicting character that it cannot be reviewed by this court. But an examination of the evidence will show that it was given by witnesses who spoke largely from mere impressions gained from rude and necessarily inaccurate measurements of the drift and observations of its direction (Tr. pp. 36, 63, 70), and which, whether presented by the plaintiffs or the defendants, were not entitled to much consideration.

In order to clear up this important point of fact the court (Tr. p. 149) appointed R. A. Jackson, a duly qualified and expert surveyor, with instructions to make an accurate survey of the old shaft three and the new shaft three and the drift running from the new shaft for the purpose of determining accurately their posi-

tion with regard to each other, and to make a careful detailed and technical survey for the purpose of ascertaining such facts, and then to make a map thereof showing the exact situation and to make his report thereon to the court.

The referee filed his report (Tr. p. 152) showing that he had cleaned out defendants' shaft three and tunnel and made a survey of the tunnel, and found that it would tap the plaintiffs' shaft number three nine-tenths of a foot from the south end of said shaft crossing the east side line and penetrating under the shaft one and one-tenth feet at an elevation of two and three-tenths feet from bedrock. This report was accompanied by a diagram appearing at page 154 of the Transcript, which clearly shows the plaintiffs' shaft number three as it would have been if it had gone to bedrock, and a vertical cross section of defendants' drift extending two feet and ten inches above bedrock, and that the drift cuts the lines of plaintiffs' shaft as produced.

This, taken in connection with the uncontradicted evidence above cited to the effect that the drift ended in undisturbed gravel, amounts to a mathematical demonstration that the plaintiffs' shaft did not reach bedrock. Add this demonstration to the testimony of the witnesses who swore that there were no traces of bedrock on the dump at the mouth of the plaintiffs' third hole (McLaren, p. 118, Crane, p. 123, Meehan, p. 132) *and whose evidence on this point was absolutely uncontradicted,* and to the failure of Nelson to swear that

hole three went to bedrock, and the conclusion is irresistible that the court, in finding a completion of the work, not only acted without evidence, but in the face of the affirmatively proven and uncontradicted facts.

II.

The case presented does not justify a decree for specific performance. Nothing is better settled than that specific performance is not a matter of absolute right, but rests in the sound discretion of a court of equity. If the circumstances surrounding the transaction are such that specific performance will work a hardship or injustice the court will leave the parties to their remedies at law.

Willis vs. Tayloe, 8 Wall, 567,
Fry on Specific Performance, Sec. 25,
Vol. 22, A. & E. Encyc. of Law, 931.
2 Story's Eq. Jur. Sec. 742,
Johnson vs. Hubbell, 2 Stockt. Ch. 332,
Matthews vs. Davis, 102 Cal. 202, 208.
Marr vs. Shaw, 51 Fed. 860, 864.

It is submitted that the principle of these authorities has a peculiar application to the case at bar.

By the first finding (Tr. p. 159) it is found that at the time of the commencement of this suit all three of the defendants, Meehan, Larson and McMahon, owned the mining claim in question. The nature and extent of the interests of the several defendants was not found and for that we must go to the plaintiff's verified

amended complaint, the truth of whose statements they are not in a position to deny.

The complaint sets out a written agreement between McMahon and Meehan by which they formed a partnership with each other for the purpose of prospecting, locating, occupying and developing mining ground in Alaska (Tr. p. 13). The complaint further states that Meehan had a similar agreement with the defendant Larson, and that the claim was located by and in the name of Meehan (Tr. p. 13).

Whether the result of Meehan's contracts with McMahon and with Larson was to give McMahon an undivided one-quarter or an undivided one-half interest in the mining claim, the subject of this suit, must be a disputable point.

By his answer (Tr., p. 17) he claimed to own an undivided one-half and prayed that his interest be not determined in this action, but in another suit pending in the District Court, brought by him for the purpose of determining the extent of his interests. If he should prevail in that suit the result would be that McMahon and Larson would be held to own only an undivided one-half, and it is this one-half which the lower court has decreed must be conveyed to the plaintiffs. The final result of this is that a court of equity has given effect to an arrangement by which the owners of an undivided half of a mining claim have agreed to convey all their interest therein as a compensation for the labor

of the plaintiffs in sinking three prospect holes thereon to bedrock. From this arrangement Meehan and Larson get no benefit whatever, lose all their title, and McMahon derives the full advantage.

The contract itself, since it contains no mutual promises or agreements, is no contract at all (*Fish vs. Buchanan*, 96 N. W. 339), and is so one-sided and unconscionable that the only explanation for its ever having been entered into must be that at the time of its execution both Meehan and Larson overlooked the interest of McMahon in the property, or else that they intended to give the plaintiffs one-half of such interest as they had. But the result as worked out by the court below inflicts on them an intolerable hardship, which we confidently submit should not be aided by the active interference of a court of equity. The case presented is one in which, under the principles of the authorities above cited, the court should decline to interfere and should leave the plaintiffs to such remedies as they may be afforded in an action at law.

III.

The plaintiffs had judgment (Tr. p. 165) "for one-half of the royalties and rents collected and received by said defendants from said described premises, said one-half of the said rents amounting to the sum of $1,500." There is nothing in the findings or conclusions of law upon which this portion of the decree can be based.

The fourth conclusion of law (Tr. p. 162) was, "that

the plaintiffs are entitled to a judgment and decree for one-half of the rents and royalties collected and received by the defendants M. Meehan and T. Larson," so that the decree, in giving judgment for one-half of the rents and royalties received by all three defendants, went further than the fourth conclusion of law, which confined the plaintiffs' recovery to one-half of the rents and royalties received by two of the defendants, Meehan and Larson.

But further than this, the decree could only be justified by a finding as to the amount of the rents and royalties received by Meehan and Larson, as to which there is no finding whatever.

The seventh finding (Tr. p. 16) was as follows: "That during said time *defendants* have worked and mined said claim through laymen and have collected and received all royalties, rents and profits of the said described premises amounting in the whole to three thousand dollars." There is nothing in the findings showing what proportion of the rents and royalties collected by all three defendants was collected and received by the defendants Meehan and Larson, nor any finding as to the extent of the interest in the mining claim or in its rents and profits owned by Meehan and Larson.

If any effect at all is to be given to the fourth conclusion of law as a guide to what the provisions of the decree should have been, the court should have found

as a fact how much of the rents and royalties were collected and received by Meehan and Larson, and the judgment should have been for one-half of that amount. But, as the matter was left by the findings, there was absolutely no material from which could be determined the amount for which the plaintiff should have judgment.

A study of this record must make it manifest that the case which it presents does not appeal to the favorable discretion of the court. The parties to the contract sued on evidently entered into it in ignorance of or without regard to the rights or claims of McMahon. The extent of his interest is left undetermined, although the acertainment of its amount is essential to a proper judgment. If, as he claims, he is entitled to one-half, the other half is given to the plaintiffs to feed the amount of their claim under the contract, and an agreement from which Meehan and Larson intended and expected to reap an advantage is, by a court of equity, enforced to their ruin.

The burden of pleading and proving that the consideration of the contract to convey was sufficiently adequate to entitle them to the favor of the court was on the plaintiffs.

Agard vs. Valencia, 39 Cal. 492.
Nicholson vs. Tarpey, 70 Cal. 609.
Windsor vs. Miner, 124 Cal. 492.
Prince vs. Lamb, 128 Cal. 120.

Stiles vs. Kain, 134 Cal. 170.

Under these authorities, which express the general rule of law upon the subject, plaintiffs should have pleaded and proved the value of the land, so that the court might judge whether the consideration was fair. This they failed to do, but there is enough in the record to show that the contract of Meehan and Larson to convey was based upon a wholly inadequate consideration. The digging of three small holes to bedrock through muck and gravel for a distance of seventeen feet was a matter of a fortnight's work for two men, and for this, under the decree, they get a half interest in a claim which has already produced ten thousand dollars and is probably worth fifty thousand. Surely, here is enough to startle a court into a doubt as to the propriety of its according to the plaintiffs the extraordinary remedy of specific performance. At least, the circumstances surrounding the contract and the parties to it were such as to make it more than ordinarily incumbent on the plaintiffs to make a full and distinct showing of their completion of the work for which they are claiming compensation on so large a scale. Instead of this the court below proceeded upon evidence which is wanting in every essential element of conclusiveness: on the statement of only one of the two plaintiffs, who declined to say, except by inference, that the work had been done. And, finally, to make this weak and insufficient testimony the basis of its findings and decree, the court was obliged to

reject and did reject the clear, positive, uncontradicted and unchallenged testimony of persons having no interest in the suit, who swore that there was no trace of bedrock on the dump about the plaintiffs' third hole, that the defendants' third drift reached the space where the plaintiffs' third hole would have been if it had been sunk as the contract required, and that this space was occupied by gravel which had never been disturbed. It is confidently submitted that the record discloses a case which should not have favorably moved a court of equity, and where the conclusions of fact are not only without evidence to sustain them, but are opposed to the only clear and positive testimony which was before the court.

Not only does this complete rejection and disregard of the evidence by the court need to be explained, but some reason must be sought for the action of the court below in finding the estoppel to which we have above referred. Manifestly, if the court considered that the evidence proved the plaintiffs' completion of the contract, the finding as to the estoppel was purely unnecessary and superfluous. In seeking, therefore, a reason for the court's finding as to the estoppel, we are driven to the conclusion that the estoppel and not the evidence was the basis of the finding as to the plaintiffs' completion.

The court found that the plaintiffs had completed their contract, not because the evidence so showed,

but because the court conceived that the defendants' conduct prevented them from disputing the fact. In this way, and in this way only, can all the findings of the court when taken together, be explained and harmonized, and the result is that the judgment must be based upon a legal conclusion so clearly wrong that its error needs no illustration from us.

We submit that the record shows that the case was not properly tried, and that the interests of justice demand that the judgment should be reversed and a new trial ordered.

Respectfully submitted,

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SIDNEY V. SMITH,

Counsel for Appellants.